

DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D. C. 20548

*J. Roberts
Proc II*

7797

FILE # **P-191323**

DATE: **September 25, 1978**

MATTER OF: **J.S. Mathers, Inc.**

DIGEST:

1. Letter to Member of Congress protesting agency action is considered to be a timely filed agency protest because letter was forwarded to the Office of the Chief of Engineers and was received within the filing time period described in GAO Bid Protest Procedures.
2. GAO will not disturb the correction or revision of a Government estimate absent a showing of unreasonableness on the part of the Government agency.
3. Reinstatement of canceled IFB is sanctioned when to do so works no prejudice on the rights of others in the competition, and the integrity of the public bidding system is promoted.

An invitation for bids (IFB) No. DACW65-78-B-0001 for building construction at Gaithright Lake, Virginia, was issued by the U.S. Army Corps of Engineers, Norfolk District, Virginia (Army). At bid opening, the following two bids and the Government estimate were publicly disclosed:

W. G. Construction Corp. (W.G.)	\$2,259,930.00
J. S. Mathers (Mathers)	\$2,400,216.00
Government Estimate	\$1,757,980.00

The bids of W.G. and Mathers were 28.6 percent and 36.5 percent, respectively, above the Government estimate. Because of these differences, Army reports that its contracting officer "reviewed the Government

estimate in considerable detail," concluding that it was fair and reasonable. Consequently, the contracting officer determined that the two bids received were unreasonably high and rejected the bids indicating that the project would be readvertised at a later date.

Upon receipt of its bid rejection letter, the low bidder, W.G., filed a protest with this Office. As a result of this protest, which questioned the reasonableness of the Government estimate, the Army undertook another review of its estimate and this time found it to be defective. After consulting with local area subcontractors, Army determined that the labor surplus factor was underestimated. The Army reports that a new power plant construction project approximately 20 miles from Gaithright Lake has a high wage rate scale which caused area subcontractors to increase their skilled labor costs. To reflect this condition, the contracting officer determined that the Government estimate should be revised in the increased amount of \$107,378.00. With a new estimate of \$1,865,358.00, the low bid on the canceled solicitation was approximately 21.2 percent above the estimate. The contracting officer also concluded that readvertising the procurement was not likely to effect a price reduction and reinstated the IFB. Accordingly, on April 19, 1978, the otherwise qualified low bidder, W.G., was awarded the contract.

On May 17, 1978, we received a letter from Mathers protesting the award to W.G. From a letter it submitted to a Member of Congress, [hereinafter cited as the "Constituent Letter"], it appears that Mathers became aware on April 25, 1978, of the Army's decision to award the project to W.G. Construction Corporation. This letter was Mathers' "official protest" and requested that the matter be investigated.

Since the Constituent Letter establishes that Mathers had actual knowledge of its basis for protest not later than April 25, the Army contends that the protest to GAO, filed on May 17, is untimely pursuant to our Bid Protest Procedures which prescribe in 4 C.F.R. § 20.2(b)(2) (1978) that "protests shall be filed not later than 10 [working] days after the basis for protest is known."

In our opinion the initial protest of Mathers was made in its Constituent Letter which, in turn, was

referred to the Army. If a timely initial protest to the contracting agency was made, the subsequent protest to GAO would be timely. In this regard, our Bid Protest Procedures state at 4 C.F.R. § 20.2(a) (1978):

"Protesters are urged to seek resolution of their complaints initially with the contracting agency. If a protest has been filed initially with the contracting agency, any subsequent protest to the General Accounting Office filed within 10 days of formal notification of adverse agency action will be considered provided the initial protest to the agency was filed in accordance with the time limits prescribed in paragraph (b) [10 working days from knowledge of basis] * * *." (Emphasis added.)

Army reports that the Constituent Letter was received in the Office of the Chief of Legislative Liaison in the Office of the Secretary of the Army on May 5. We are further advised that it was then transmitted to and received in the Office of the Chief of Engineers on May 9, which is within 10 working days of the date Mathers had actual knowledge of the basis for its protest. However, in urging untimeliness, the Army also contends that the protest was not filed with the contracting agency until it was received by the contracting officer on May 16, or when the Office of the Chief of Engineers transmitted the letter to the contracting officer on May 11, both dates being outside the 10 working days period for timely filing.

We are aware of no legal basis which would justify Army's position. The U.S. Army Corps of Engineers is under the control and supervision of the Chief of Engineers and for purposes of our Bid Protest Procedures, we consider the receipt of the protest in the Office of the Chief of Engineers to be a proper and timely filing with the contracting agency. In light of the above, it is unnecessary for us to determine whether the earlier May 5 receipt by the Army's Congressional Liaison Office also constituted a filing with the contracting agency.

Army's reference to our decision in Fred M. Cox, Inc., B-191265, March 3, 1978, 78-1 CPD 169, is clearly

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distinguishable from the instant situation. In that case the protest correspondence was addressed to the Comptroller General but was sent through the contracting agency and it failed to reach our Office within the 10 day filing period, and as such, was declared untimely. However, in the instant situation, the Constituent Letter should have been considered as a protest to the contracting agency when it was timely received by the agency.

We conclude therefore, that the protest was timely filed with the contracting agency, and that the subsequent protest to the GAO, filed prior to receipt of any initial adverse agency action on the part of the Army, is also timely under our procedures and for consideration on the merits.

With regard to the upward revision of the Government estimate subsequent to rejection of bids and the protest of W.G., we have held that such a correction will not be disturbed absent a showing of unreasonableness on the part of the Government agency. See Durocher Dock & Dredge, Inc., B-189704, March 29, 1978, 78-1 CPD 241 and cases cited therein.

We share the protester's concern that a large nearby construction project's effect on the wage rate scale apparently escaped the knowledge of those preparing and reviewing the Government estimate. However, it is our opinion that the existence of the construction project and its upward effect on wage rates in the area is reasonably set forth in the record and that the correction of the Government estimate was justified on that basis.

Although Mathers contends that the action to reinstate the IFB was prejudicial to its interests, we find no prejudice. The agency merely reinstated the status quo and Mathers obtained no right to a resolicitation where award may be made under the solicitation as issued.

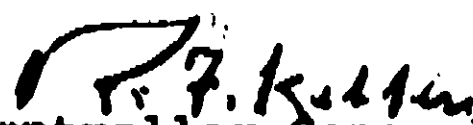
We have sanctioned reinstatement of canceled invitations when to do so would work no prejudice on the rights of others in the competition and would, in fact, promote the integrity of the public bidding system. Tennessee Valley Service Company, B-188771, July 20, 1977, 77-2 CPD 40. In the circumstances of this procurement

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we have no reason to question whether reinstatement and award on the initial IFB would be in the Government's best interest.

Accordingly, the protest of Mathers is denied.


Acting Comptroller General
of the United States